No. 5377

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ORIENT INSURANCE COMPANY (a corporation), and THE EMPLOYERS' FIRE INSURANCE COMPANY (a corporation),

Plaintiffs in Error,

vs.

CLEMENTE ARIASI,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT.

This is a writ of error to the District Court for the Northern District of California wherein it is sought to reverse a judgment in favor of the defendant in error against the plaintiffs in error.

The action was a complaint on fire insurance policies upon a stock of wine manufactured and in storage in the bonded winery of defendant in error at Santa Rosa, California, which wine was destroyed by fire during the existence of the policies.

FACTS OF THE CASE.

Clemente Ariasi, defendant in error, took out a policy of fire insurance with the Orient Insurance Company

on October 23, 1924, for five thousand (5000) dollars, on stock of wine manufactured, unmanufactured, in the process of manufacture, * * * his own or held by him in trust * * * and while contained in the frame winery building * * * at Santa Rosa, California.

Clemente Ariasi, defendant in error, took out another policy of fire insurance with The Employers' Fire Insurance Company on the 6th day of October, 1924, for fifteen hundred (1500) dollars, on stock of wine manufactured, unmanufactured, in the process of manufacture, * * * his own or held by him in trust * * * and while contained in the frame winery building * * * at Santa Rosa, California. That at the time of the issuance and delivery to Clemente Ariasi of the policies of insurance, he was the owner and holder of a permit from the Prohibition Department of the United States Government, No. Calif. A 62 to:

1. Manufacture wine for non-beverage purposes;
2. Tax, pay and remove same from premises;
3. Transfer the same in bond, on permits;
4. Sell wine for sacramental purposes, on permits.

That some time during the year 1924 the Federal Prohibition Department charged Clemente Ariasi with having violated the terms of his permit by having illegally disposed of wine in violation of said permit. That on the 26th day of December, 1924, an order of revocation of said permit was made and entered against Clemente Ariasi.

That an *information* was filed by the United States Government against Clemente Ariasi, on the same grounds as that set forth for the violation, by the Federal Prohibition Department in its permit proceedings; and that on the 6th day of October, 1924, the said information was dismissed by the United States Government, the bonds exonerated and his sureties discharged.

The United States Government also filed a *libel proceedings* against this same wine, destroyed by fire, and referrel to in both the *information* and the *permit revocation proceedings,* basing its libel upon the same set of facts as the Federal Prohibition Commissioner alleged in its revocation proceedings as well as the same set of facts relied upon in the information which was dismissed.

This libel proceedings was also dismissed on January 5, 1927.

The wine was contained in a bonded winery and bond was furnished by Clemente Ariasi to the United States Government and said bond was not cancelled until sometime during the month of March, 1926.

During the pendency of the revocation proceedings by the Federal Prohibition Commissioner, on the 26th day of October, 1924, another permit, for the year 1925, was issued by the Federal Prohibition Department, similar to the permit in existence for the year 1924, and this said second permit was also numbered, "Calif. A 62", giving unto the said defendant in error, Ariasi, the same rights for the year 1925 as was given to him for the year 1924. *There is no evidence in the*

record showing that this second permit had ever been cancelled or revoked.

On the 26th day of June, 1925, and before the expiration of the two fire insurance policies, the said bonded winery and wine was totally destroyed by fire. Proofs of loss were duly submitted and accepted by the fire insurance companies but payment thereon was refused, thus the cause of the action on the fire insurance policies to collect the insurance due to defendant in error under the contracts of insurance.

A jury trial was waived and the case was tried before the court. The only affirmative pleaded defenses which were and now are under consideration, are:

1. That plaintiff was guilty of fraud and false swearing in his proofs of loss;
2. That the hazard to the property was increased;
3. That at the time of the fire, defendant in error was not the unconditional and sole owner of the property.

Verdict was for the defendant in error, findings of fact were filed and judgment was entered against the plaintiffs in error, who now sue out the writ of error to this court.

There are eighteen assignments of error relied upon by the plaintiffs in error, which the plaintiffs in error group under three propositions of law, that is:

1. That the evidence was insufficient to justify the decision of the court;
2. That the decision of the court and the judgment is against law;
3. Erroneous introduction of rebuttal evidence.

ARGUMENT.

THE COURT DID NOT ERR IN FINDING FOR DEFENDANT IN ERROR; THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE VERDICT.

It was stipulated in open court by both parties thereto, relative to certain statements of fact and therefor there was no dispute thereon, and as all of the material allegations of the defendant in error's complaint were admitted there was no other alternative for the court to do but to render decision for the defendant in error. However, the plaintiffs in error did not, at the conclusion of the case of the defendant in error, or at the conclusion of all of the testimony, or at any other time, make any motion for the direction of a verdict in their favor on the ground of insufficiency of the testimony, or for any reason. *In such case it is well understood that they cannot on appeal, question the sufficiency of the evidence.*

On page 13 of plaintiffs in error's brief they contend that the evidence introduced at the trial was not only insufficient to justify the decision of the court and the judgment entered thereon, but that judgment should have been entered for the defendants.

It is a well settled rule of law in this Appellate Court that where no motion was made by the defendants at the trial, for a directed verdict, that the insufficiency of the evidence cannot for the first time be raised in this Appellate Court.

Schindler v. U. S., 24 Fed. (2d) 204;
Utley v. U. S., 5 Fed. (2d) 963;
Bilboa v. U. S., 287 Fed. 125.

This rule applies to civil cases as well as to criminal cases, and it is essential for a counsel to make a motion for a directed verdict in order that the Appellate Court may review the sufficiency of the evidence to support the verdict. As this court said in the case of *Bank of Italy v. Romeo & Co.,* 287 Fed. 5, 7:

> "Where a party claims to be entitled to a verdict as a matter of law, he must make that contention in the trial court in order to preserve his right to make that claim in the Appellate Court."

This court again, in the case of *China Press v. Webb,* 7 Fed. (2d) 581, *which was a case tried without a jury,* said:

> "Upon the trial there was no motion or request for special findings, nor at the close of the testimony was there a request for a finding on the issues, nor did the defendant present to the trial court the question of law whether there was substantial evidence to sustain the findings for the plaintiff, below. The record therefore presents no question of the sufficiency of the evidence to support the judgment."

THE FIRST GROUND RELIED UPON BY THE PLAINTIFFS IN ERROR, i. e.:

> "That at the time of the fire, defendant in error was not the unconditional and sole owner of the property because of the fact that the permit issued to him by the National Prohibition Department for the year 1924, had been revoked, and Mr. Ariasi was therefore, as a result of such revocation proceedings deprived of his property rights in the wine, and that the wine so lawfully manufactured, owned and possessed by Ariasi became 'contraband' and 'outlawed' after the permit was revoked."

In support of the aforementioned contention they quote a number of decisions, which decisions may be grouped under two theories. The first group of decisions has to do with illicit mash, stills and intoxicating liquor manufactured *without any permit,* and second, "on motions to return property" in criminal cases requiring affirmative allegations in the petition, that the petitioner *lawfully possessed* said property as a necessary prerequisite for the court to direct the return thereof.

It is our contention that neither of the two above referred to theories apply in this case for the reason that Ariasi was in the first instance, *legally permitted,* by the Federal Prohibition authorities, to manufacture and own the wine insured by the insurance companies which was destroyed by fire, and that said wine was not at any time "contraband" or "outlawed" or illegally "possessed", and the theory of law, therefore, applicable to criminal cases requiring a different manner of proof, does not apply to this civil case.

The major case relied upon by plaintiffs in error is that of *Gonch v. Republic Storage Co.,* which was a New York State case in which the Supreme Court of the United States refused to grant certiorari, but it has no parallelism whatsoever with the case now at issue for the reason that in the *Gonch* case, which set up a similar defense, "that there was no property rights in whiskey", showed that it was held in direct violation of a *statute.* In that case there was a direct statutory violation and under no condition could they *lawfully have acquired a permit* from the National Prohibition Department, therefore, upon the introduc-

tion of proof of the violation of the statute it necessarily followed "that no property rights existed therein". The case referred to an "importation" of whiskey from France, temporarily stored within the United States awaiting trans-shipment to Mexico, therefore the plaintiff in that case could under no condition *lawfully* acquire any property right therein.

That condition is directly opposite to the case now before the court because Mr. Ariasi *lawfully* manufactured, possessed and owned the wine *under a permit* authorized under a law of the United States, and until his *title* to said property was lawfully divested, either by voluntary transfer to some other person or by judicial decree, he had a "property right" therein, which both law and equity recognizes.

II.

ANALYSIS OF POINTS AND AUTHORITIES REFERRED TO BY PLAINTIFFS IN ERROR.

The first case referred to on page 36 of the brief is that of *Erb v. German American Ins. Co.,* an Iowa case, reported in 67 N. W. at page 583. The attorney for plaintiff in error referred to the first column on page 585, where it is stated that "where the purpose of the contract is to protect one in an illegal business it is void".

We think that this statement of law is axiomatic as well as elemental, but whereby they can cite this decision in support of their contention is beyond me, because an analysis of this case, and we thoroughly

agree with the proposition of law set forth therein, substantiates our theory from every angle.

The proposition considered by the court there was,

> "Can there be a recovery on an insurance policy covering articles of merchandise which are owned, and kept, and used in violation of the laws of the State?"

It was urged that to permit such a recovery would be against public policy and the line of decisions nearest to substantiating that view was the case of *Kelly v. Insurance Co.,* 97 Mass. 284, and that case was on a stock of liquors kept by the assured for sale in violation of law. The court held the policy void and closed its decision as follows:

> "His contract was in contravention of law and void as to him, because he entered into it in order to protect himself in his illegal acts."

The case as to authority is grounded on holdings in cases involving *marine* insurance. In such cases the rule is announced that "the illegality of the voyage in all cases avoids the policy and the voyage is always illegal when the goods or trade are prohibited or the mode of its prosecution violates the provisions of the statute".

The distinction between cases where contracts are or are not void as against law is well stated in *Armstrong v. Toler,* 11 *Wheaton* 271.

> "The principle established is that where the goods is illegal, immoral and wrong, or where the true purpose of the contract is to advance, or encourage acts in violation of law, it is void. But if the contract sought to be enforced is collateral and independent, though in some nature connected

with acts done in violation of law the contract is not void."

This rule is followed in *Johnson v. Insurance Co.,* 127 Mass. 555.

In *Insurance Co. v. de Graf,* 12 Mich. 124, the policy included among other thing, groceries, among which were liquors and the policy was claimed to be void because to sustain the policy with liquors included would be insuring an illegal traffic. The case is quite in line on principle with the one at bar. The case briefly treats of the rule as to *marine* insurance, holding it to be inapplicable. * * *

> "If this policy were in express terms a policy insuring the party selling liquor against loss by *fine* or forfeiture, it would be quite analogous. But this insurance attaches only to property and the risks incurred against are not the consequence of *illegal acts,* but of accident. * * * By insuring his property, the Insurance Company has no concern with the use he may make of it, and as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner, unless the contract itself is for a directly illegal purpose. Collateral contracts in which no illegal design enters are not affected by an illegal transaction with which they may be remotely connected. In the case of Ocean Insurance Co. v. Polleys, 13 Peters 157, an insurance upon a ship known by the insurance company to be liable to *forfeiture* under the registry laws of the U. S., was held valid and a recovery was permitted for a loss while sailing under papers known to be illegal. It is difficult to perceive how public policy can be violated by an insurance of any kind of property recognized by law to exist."

In *Kerrigan v. Insurance Company,* 53 Vermont 418, the above Massachusetts and Michigan cases are

noticed. The policy in the *Kerrigan* case covered a stock in trade, consisting of groceries, provisions, drugs, including wines and liquors, and in that case it is said:

> "If the purpose of the contract in question had been to protect the assured in the sale of intoxicating liquors it would have been null; * * * the contract was legal on its face, nothing appearing to show that the wines and liquors were intended for illegal sale and it is a fact, notwithstanding proof, that in compounding medicines, liquors, especially wines and alcohol are of daily use and for that purpose their possession and use by druggists are legitimate. * * * There was evidence tending to show that he illegally sold them and the fact may have been that the latter trade was the larger and the main one. If such illegal traffic was the business of the assured, and his legal traffic and transactions with other property a mere cover ostensibly carried on for the purpose of enabling him to secretly disguise his iniquity *the purpose of the contract would be to protect him in illegal ventures and it would therefore be void;* but if he carried on business using alcoholic liquors legitimately and occasionally sold them in violation of law *we think that if no illegal design* entered into the making of the contract in its inception that it would be so far collateral to the illegal acts that it would be inconsistent and in accordance with no well adjudged case to hold it null."

We have not seen a case in which, because of the mere use of property for illegal purposes not increasing the hazard, in the absence of stipulations to that effect, where a policy has been held void, because of such use. It is in a case where the contract itself is against public policy by the parties at the inception of

it, intending it to be an aid of purpose or design to violate the law. This case simply presents the question whether where a party uses property for an unlawful purpose that is sustainable of legitimate use, such use will render the insurance contract void as against public policy. *We think that no authority substantiates such a rule, and it does not seem to be dictated by reason.*

A condition of the policy is that it shall be void if any change takes place in the interest, title or possession of the subject in insurance. There was no change of possession nor right of use. It is true that the policy stipulates against a change of interest or a change of title or a change of possession. *There was not a change of either.* Plaintiff's interest in the safety of the property was as great after the contract as before, so that there was, because of the contract, no increase of hazard.

Another defense pleaded was that the plaintiff was not the sole and unconditional owner of the property. It was an affirmative defense, and the evidence did not support it.

Another defense pleaded is that in making the proofs of loss, the plaintiff swore falsely with intent to defraud the defendant. The complaint is as to the value fixed upon the property. If the plaintiff in his proof of loss placed the amount too high through inadvertence or mistake, with no intent to defraud, the statement would not necessarily defeat plaintiff's right to recover. The very proposition to be considered was as to an intentional mis-statement.

The next case is the case of *Gallagher v. U. S.,* reported in 6 Fed. (2d) 758, at pp. 17 and 18 of the brief, is a Circuit Court of Appeals decision from the second circuit under date of March 16, 1925, and was a petition for the return of liquor alleged to have been unlawfully seized under a search warrant. The premises were that of a Warehouse Company and the court said that the papers supporting the petition were fatally defective *"because they do not show that he was in possession of the liquors at the time they were seized",* and all that the court held in that case was:

> "In the case of an unlawful seizure of liquors themselves *unlawfully* possessed, if anyone be entitled to their summary return he is only the person whose *possession* has been disturbed, The summary proceeding is necessarily statutory. * * * It is purely possessory since its sole effect is to restore a statue quo unlawfully violated under color of law. As such it is indeed doubtful whether consideration of *title* can ever arise in it or whether a bailer can, in any event evoke it.
>
> It follows as we have said that Gallagher has no *title* which we may recognize. We need not consider how far for any purpose one may have property in liquors."

Particular attention of this court is called to the quotation on page 17 as not being a correct quotation from the decision. On line 7 of the quotation, after the period following the word *act,* the sentence in the brief starts out "Of this liquor". The correct wording in the decision is " *on* this *record",* therefore it will be seen that there is quite a difference between the use of the phrase "Of this *liquor"* and *"on* this *record",* which is quite misleading. On line 3 of page 18

following the word "and" after the comma after the word *"act"* it will be noted that they have inserted the word "that" which is quite misleading. Then on line 4, after the period following the word "liquor" they have inserted the word "this" for the phrase "thus the".

Therefore it will be noted that in the parenthesis at the end of the quotations where they say "The italics are ours" there is quite a difference in the reading of the quotation itself and the quotation as is set forth in the brief with various interpolations and misquotations.

The major case upon which this brief is premised is that of *Gonch v. Republic Storage Company,* which originated in the Supreme Court for New York County, during the year 1925, reported in 211 N. Y. Supplement at 233. The case went from this court to the Superior Court, Appellate Division, during 1926, reported in 219 N. Y. Supplement at page 46, and from there it went to the Court of Appeals for the State of New York, during the year 1917, reported in 157 N. E., 136, which last court reversed the two lower courts and from which decision a writ of certiorari was refused by the United States Supreme Court on November 28, 1927. The action was originally an action for damages for non-delivery of twenty-seven barrels of whiskey which was stored in a bonded warehouse. The facts of the case are that plaintiff purchased during the year, 1922, thirty barrels of whiskey which was then located at Havre, France. He shipped the whiskey from Havre via New York for trans-shipment to Mexico. It was temporarily stored in a bonded

warehouse in New York, where twenty-seven barrels of whiskey were stolen. The defense to the suit was "that there was no property rights in whiskey; that the importation and attempted reshipment were illegal and prohibited acts and plaintiff was not damaged by the theft; and that the liquor was imported without written consent of the Collector of Internal Revenue". This defense was overruled in the two lower courts but was finally sustained in the court of last resort in New York. The Court of Appeals held that the plaintiff suffered no injury to a lawful property right and therefore is entitled to no damages.

The upper court further said:

> "On May 22nd, a month before the whiskey arrived at New York for the avowed purpose of transport to Mexico the Supreme Court of the United States had announced that the transportation of intoxicating liquors from a foreign port to some part of the United States to another foreign port is prohibited."

Quoting from *Grogan v. Walker,* 259 U. S. 80, 66 Law. Ed. 836, the New York court further said:

> "Concededly plaintiff did transport the liquor to New York without first obtaining a permit. *None could lawfully have been issued.* He could not therefore lawfully have or possess the whiskey, for it had been used in violating the statute and no property rights existed in it."

and the court further said:

> "That we, saying that in Armstrong v. Sista, 242 N. Y. 142 N. E. 254, expressed doubt whether legal damage is sustained or may be proven for deprivation of property which the plaintiff may not legally hold, use or sell. * * * Now the

> doubt is dispelled and we answer that no damage is sustained."

Therefore, it will be seen that the key case relied upon has no parallelism whatsoever with the case at issue, because in the *Gonch* case there was a direct statutory violation and under no condition could they lawfully acquire a permit, therefore, upon proof of the violation of a statute it necessarily follows that "no property rights existed therein". But in this case, which is now before this court, the property was lawfully acquired and possessed under a permit and there was no evidence introduced of the violation of any *statute* anl the only evidence which was introduced on behalf of the defendants was the violation of a *permit,* which violation and revocation did not deprive Ariasi of any property rights but only deprived him of the special privileges granted by the *permit.*

In the next case of *State v. Lee,* an Oregon case reported in 253 Pac. at page 533, and in plaintiffs' in error brief at page 16, this was a criminal case where there was a conviction of possession of mash, wort and wash for distillation and in that case the court said in part:

> "Illicit mash, stills and intoxicating liquors are contraband. No person can hold title or ownership therein."

But it must be remembered that in this case they were attempting to invoke the construction of the State Constitution and laws of the State of Oregon, and the court in that case held that the construction of the

Constitution or of a state law had no application to searches and seizures of contraband goods.

The case of *U. S. v. Gartan,* 4 Fed. (2d) 848, p. 17 of brief, was a case of the District Court for the Southern District of California and was on a motion for suppression of evidence and return of property. Judge Bledsoe, speaking for the court, said that the burden was upon the defendants to show that the liquor or property in their possession was there lawfully and that burden has in no wise been met.

But this case is not authority for the fact that under all circumstances or under all conditions no property right shall exist in any such liquor.

The case of *U. S. v. Kaplan,* 286 Fed. (2d) 963, was a District Court decision for Georgia, Feb. 15, 1923, and was also a criminal case involving a petition for return of liquor. This case is referred to on p. 16 by the attorney for plaintiffs in error and bears the addenda "(the italics are ours)". The italics which I assume they refer to are on line 5 from the bottom of page 16, "has a legal permit". In the decision this reads "is legally permitted", therefore, the "(the italics are ours)" interpolation makes the sense of the paragraph quite different than "is legally permitted".

The case of *U. S. v. Ryskowski,* reported in 267 Fed. at 866, and in the brief at p. 16, was also a criminal case on a motion for return of property and the court said:

> "In neither case will any of the *illicit* mash or *illicit* liquors taken, or stills or parts of stills, be returned—the same being contraband."

The case of *U. S. v. Vatune,* reported in 292 Fed. 497, brief at p. 17, is a District Court case from the Northern District of California, Southern Division on August 31, 1923, and was a motion to return 402 bottles of wine which was being transported upon the streets of San Francisco in a truck. Judge Bledsoe said in that case:

> "If the liquors be seized from *an unlawful possession* then there exists no *property rights* in it on the part of its possessor and in consequence no right to ask for its surrender or return. Citing from Section 33, National Prohibition Act, 'the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used'.
>
> If therefore, in any proceeding or pursuant to any form of legal redress, the claimant can successfully meet this burden of proof and show by a preponderance of evidence that it was in his *lawful ownership, custody* or *possession,* then he may ask for its return; otherwise, being outlawed by the laws of the land it will be destroyed and subject to such other disposition as the court * * * shall prescribe."

III.

THE COURT DID NOT ERR IN RESPECT OF ANY RULING AS TO THE RECEIPT OF TESTIMONY OR IN RENDERING ITS DECISION; SPECIFICALLY IT DID NOT ERR IN RESPECT OF ANY OF THE FOLLOWING RULINGS ASSIGNED.

(1) Assignment of Error No. I.

In the first assignment of error made by the plaintiffs in error, Tr. 83 and 84, it is claimed that the court erred in permitting the introduction of the dismissal of an information filed against Ariasi which

was based upon the same state of facts as was set forth in the permit revocation proceedings before the Prohibition Department. As the defendants had attempted to show a violation of law, this was introduced for the purpose of showing that there was no criminal violation and that Ariasi was judicially exonerated therefrom, and so it was proper rebuttal evidence.

(2) Assignment of Error No. II.

Which appertains to the admission of the dismissal of a libel proceedings by the United States Government against the same wine that was insured in the insurance policies. The plaintiffs in error were claiming and had introduced evidence that Ariasi had no property rights in this wine. As the only other person, other than Ariasi who could have property rights in the wine was the United States Government, as a result of an alleged criminal violation, and as this libel was dismissed, it was proper rebuttal evidence to show that title was never taken from Ariasi by the Government and therefore Ariasi was the sole and unconditional owner of the wine.

(3) Assignment of Error No. III.

The objection was made to the introduction of a letter from the Prohibition Commissioner showing the exoneration of a five thousand (5000) dollar bond. This was proper rebuttal evidence because the place where the wine was stored was a bonded warehouse and under the Internal Revenue Laws it was necessary for Mr. Ariasi to put up this bond, and it was proper rebuttal evidence to show that the bonded

warehouse was considered by the Government to be such, until the date of the cancellation of the bond, i. e., March, 1926, which was after the fire had occurred.

(4) Assignment of Error No. IV.

In this assignment of error it is contended by the plaintiffs in error that the decision was against the evidence. If this were true the plaintiffs in error should have made a motion for a directed verdict. This was not done.

(5) Assignment of Error No. V.

This assignment of error appertains to the refusal of the court to approve plaintiffs in error findings of fact and conclusions of law. As the court found for the defendant in error, the findings of fact and conclusions of law are supported by the stipulations on file as well as the evidence introduced and is based upon a substantiation of the pleadings in the case.

(6) Assignment of Error No. VI.

Refers to the value of the wine at the time of the fire amounting to nineteen thousand five hundred thirty-seven and 50/100 dollars ($19,537.50), which was the amount set forth in the proofs of loss of Mr. Ariasi. At Tr. 80, paragraph 3, it was stipulated "that at the time of the issuance and delivery by defendants to plaintiff of said policies of insurance, plaintiff was the owner and in possession of the property insured thereby and was then of the value of nineteen thousand five hundred thirty-seven and 50/100 dollars ($19,537.50)". There was no dispute

as to the value and plaintiffs in error are therefore estopped by their stipulation.

(7) Assignment of Error No. VII.

This refers to the question of ownership of the wine. There was no evidence introduced at the trial that any person or persons other than Ariasi was the owner of the property.

(8) Assignment of Error No. VIII.

Appertains to the loss suffered by Mr. Ariasi in excess of five thousand dollars ($5,000.00). It was stipulated at the trial that if the court found that there was any loss that the loss was in the sum of nineteen thousand five hundred thirty-seven and 50/100 dollars ($19,537.50), and therefore this is covered by the stipulation.

(9) Assignment of Error No. IX.

Alleging that at the time of the trial that there was due, owing and unpaid from the Orient Insurance Company to Mr. Ariasi, the sum of five thousand dollars ($5,000.00). This is supported by the allegation in the complaint and there was no evidence introduced to show that the Orient Insurance Company had ever paid the sum of five thousand dollars ($5,000.00) to Mr. Ariasi.

(10) Assignment of Error No. X.

Appertains to the continuation of the value of the wine amounting to nineteen thousand five hundred thirty-seven and 50/100 dollars ($19,537.50). In conformance with the stipulation, the value was agreed

to at the trial if the court found that there was any value.

(11) Assignment of Error No. XI.

Refers to the question of ownership of the property at the time of the fire. It was stipulated, Tr. 80, that Mr. Ariasi was the owner of the property at the time of the issuance of the policies and there was no evidence introduced to show there had been any change whatsoever in the ownership.

(12) Assignment of Error No. XII.

Refers to the cash value of the wine being in excess of fifteen hundred dollars ($1,500.00), namely, the sum of nineteen thousand five hundred thirty-seven and 50/100 dollars ($19,537.50). This was also covered in the stipulation and there was no issue on value providing the court found that there was any value, which the court did so find.

(13) Assignment of Error No. XIII.

Objecting to the finding of the court that the sum of fifteen hundred dollars ($1,500.00) was due, owing and unpaid to Mr. Ariasi by one of the defendants, The Employers' Fire Insurance Company. It was stipulated that the policies were issued; were in force at the time of the fire and that there was a fire and that Mr. Ariasi had complied with all the conditions precedent, filing proofs of loss, etc., and the plaintiffs in error did not produce any evidence that the fifteen hundred dollars ($1,500.00) had been paid, therefore, in not denying the payment it was admitted.

(14) Assignment of Error No. XIV.

Was directed to the finding by the court that the information filed by the Government was dismissed as well as the dismissal of the libel proceedings, and that no forfeiture had ever been made of such wine by the Government. A certified copy of the dismissal of the information and libel proceedings was introduced in evidence and the finding is therefore substantiated by this evidence.

(15) Assignment of Error No. XV.

Refers to the finding by the court that Mr. Ariasi was not guilty of any fraud or false swearing. This appertained to the proofs of loss which were introduced in evidence and were necessary under the insurance policies. No evidence was introduced to show that the statements contained in the proofs of loss were fraudulent or false and therefore the finding was supported by the evidence.

(16) Assignment of Error Nos. XVI and XVII.

These assignments appertain to the conclusion of law that Mr. Ariasi was entitled to judgment against the Orient Insurance Company in the sum of five thousand dollars ($5,000.00) and interest and against The Employers' Fire Insurance Company in the sum of fifteen hundred dollars (1500.00) and interest. These sums were the amounts of insurance set forth in the policies introduced in evidence and conforms with the pleadings, stipulations and evidence introduced at the trial.

(17) Assignment of Error No. XVIII.

Is directed to the making and entering of the judgment in favor of the plaintiff and against the defendants. As the court found for the plaintiff, there was no error in the entry of the judgment.

IV.

MR. ARIASI WAS LAWFULLY IN POSSESSION OF THE WINE IN THE BONDED WINERY AND WAS THE SOLE AND UNCONDITIONAL OWNER OF THE WINE AND HAD AN INSURABLE INTEREST THEREIN.

The Supreme Court of the United States said, in the case of *Street v. Lincoln Warehouse Co.,* 245 U. S. 88, 65 Law. Ed. 151, referring to section 33, N. P. A. relative to prima facie presumption of unlawful possession:

> "Yet if that presumption should be rebutted by appropriate testimony * * * the implication is plain that the possession should be considered not unlawful even though it be by a person 'not legally permitted', i. e., by a person not holding a technical permit to possess it such as is provided for in the act.
>
> An intention to confiscate private property even in intoxicating liquor will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared."

In *U. S. v. Masters,* District Court of Penn., 1920, 267 Fed. 581, in construing Section 6, relative to permits, the court said:

> "No one is permitted to possess such unless he brings himself and his business within these exceptions and when he does so the commissioner

> shall give him a permit in writing which shall set forth fully and in detail what he may do and when and where such may be performed in order that the government and its agents may at all times be informed of his doings and if desirable to supervise and inspect his conduct so as to ascertain whether the law is being respected. In other words whatever is done shall be done openly and with knowledge."

The revocation of a permit does not necessarily mean that the stock which Ariasi had on hand after the permit was revoked could not be disposed of. All that was necessary for him to do was to file an application for a special permit to dispose of stock on hand and it is the custom in the prohibition office that where intoxicating liquor remains on hand after revocation proceedings an application should be made for special permit to dispose of same. This rule and regulation is one I believe, that this court will take judicial notice of.

As was said in the case of *Caha v. U. S.,* reported in 152 U. S. 211, 38 Law. Ed. 415, the court there said regarding rules and regulations of the Interior Department, which were not formally offered in evidence.

> "But we are of the opinion that it was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented and may be laid down as a general rule deducible from the cases that wherever, by the express language of any act of congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in

> which the business is interest and in respect to which they have a right to participate, and by which they are to be controlled the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

In the case of *U. S. v. 13 cases of Ng Ka Py,* a Southern District of California case, decided on December 30th, they dismissed a libel as having no legal foundation. The court said:

> "Jurisdiction to condemn or make other disposition of intoxicating liquor is not inherent in the courts. It is dependent upon statute and the statute here in question confers no general jurisdiction in that regard. It simply provides that the outlawed property may be seized under a search warrant * * * and it is only such property so seized that is subject to the disposition of the court. * * * These decisions show very clearly that the power to condemn or declare a forfeiture must be found in the statute and that such statutes must be pursued with at leased reasonable strictness."

In the case of *Fabri v. U. S.,* a Circuit Court of Appeals case, Ninth Circuit, February 13, 1928, reported in 24 Fed. (2d) 185, which is a petition to suppress evidence and return property. In the petition the defendant alleged only that he was in *possession* and *not* that he was in the *lawful* possession of the property. His position was that the record upon which the court acted does not show that the property seized consisted of intoxicating liquors or that his possession or use thereof was in any respect illegal. The court said:

> "Possession * * * may be lawful or unlawful depending upon the mode of acquisition or the intended use, hence restoration would not necessari-

ly operate to put the defendant in the position of committing a criminal act. The government here introduced no material evidence, but relied upon the averments of the defendant's petition and the presumption of unlawfulness arising from the fact of possession as declared by Section 3 of the National Prohibition Act.

We think that both upon principle and the weight and trend of the decided cases the view must be taken that where as here upon an unlawful search of a dwelling house, government agents seize property, the possession of which may or may not have been unlawful, the person from whose possession it is wrongfully taken is prima facie entitled to its restoration and that the government can make successful resistance to an appropriate petition for its return only by showing affirmatively by proofs other than those obtained as a result of the unlawful search, that the property was at the time of its seizure being used in the commission of crime."

In the case of *Ghisolfa v. U. S.*, Ninth Circuit, 14 Fed. (2d) 389, which was a libel case brought under Section 25, Title 2, of the National Prohibition Act, the court said on page 390:

"Our attention is directed to the provision of Section 25, declaring that no property rights shall exist in any liquor or property designed for the manufacture of liquor intended for use in violation of the National Prohibition Act. But this declaration of outlawry confers no jurisdiction upon the courts of the United States to entertain a proceeding of this kind.

These decisions show very clearly that the power to condemn or declare a forfeiture must be found in the statute and that such statute must be pursued with at least reasonable strictness."

In the case of *Hanover Fire Insurance Co. v. Merchants Transportation Co.*, Ninth Circuit Court of Ap-

peals, Decision, November, 1926, which was an *action on an indemnity insurance policy.* The court said at page 948:

> "When the policy of insurance was applied for no information was given by the insured as to the then condition of the vessel and no information was sought by the insuror. Under such circumstances if the case is controlled by the strict rule of maritime insurance the failure of the assured to give information concerning the unseaworthy condition of the vessel would no doubt avoid the policy, but as to other classes of insurance a more liberal rule obtains.
>
> According to the strict rule of maritime insurance any omission to communicate a material fact which insured is under an obligation to disclose will vitiate the policy. * * * The English and Canadian courts apparently have extended this doctrine to insure upon risks of all natures *but in the United States the trend of the latter decisions as to other than marine risks notably with reference to fire and life insurance* is to require that the non-disclosure of a fact which is not inquired about shall be fraudulent in order that it shall vitiate the policy and this rule has been applied although the policy provides that it shall be void if insured has concealed any material fact or circumstance concerning the insurance or the subject thereof.
>
> Here, no fraud was alleged or proved aside from the mere failure of the assured to communicate facts concerning which no inquiry was made and if we are correct in our conclusion that this was not strictly a marine risk such failure did not, of itself, constitute a defense."

Hazelwood Brewing Co. v. U. S., 3 Fed. (2d) 721, Circuit Court of Appeals decision, Third Circuit, February 10, 1925, which was a libel against 3,000 barrels of beer. The court said:

"Some time before this proceeding was commenced and while the company was operating under a permit to manufacture cereal beverages its plant was seized on a search warrant and the door sealed. On the facts developed at the hearing in that proceeding the court restored the brewery to the company. Before its return however the National Prohibition Director had revoked the company's permit. * * * So there was a situation in which beer in the course of lawful manufacture for lawful use had reached the stage of a beverage prohibited by law and in the absence of a permit to finish the process by reducing the alcohol it could not be carried to the stage of beverage permitted by law. *As the company had made the beer under authority of law and was not permitted to reduce its alcohol and dispose of it we find nothing unlawful in its retention.*"

In the case of *Tischler v. The California Mutual Fire Insurance Co.,* reported in 66 Cal. at p. 178, the question considered was whether the fire works kept by the plaintiff rendered void the policy under that provision of it prohibiting the keeping or use on the premises of gunpowder. The court said:

"If defendant wished to provide that the policy should be void in the event the insured should keep fire works it ought to have said so as the other companies do, as shown by the records in this case."

Section 2546 of the Civil Code of the State of California defines what an insurable interest is:

"Section 2546. Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest. (Enacted March 21, 1872.)

Where an applicant for fire insurance in the sum of eight hundred dollars had paid the con-

sideration for the insured property but had taken title in the name of another as security for a loan of five hundred dollars, and asked for insurance in the name of the creditor, loss, if any, to be paid to applicant as his interest might appear, and policy was issued with full knowledge of the facts, applicant and owner of legal title had each an insurable interest in the property, and policy was construed as intended to insure interests of both. Loring v. Dutchess Ins. Co., 1 Cal. App. 186, 188. See note to Section 2541, ante."

Section 2547 of the Civil Code of the State of California:

"Section 2547. An insurable interest in property may consist in:

(1) An existing interest;

(2) An inchoate interest founded on an existing interest; or

(3) An expectancy, coupled with an existing interest in that out of which the expectancy arises. (Enacted March 21, 1872.)"

Section 2550 of the Civil Code of the State of California:

"Section 2550. The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof. (Enacted March 21, 1872.)

Whitney Estate Co. v. Northern Assr. Co., 155 Cal. 521, 524. Also, Sieveres v. Union Assur. Soc., 20 Cal. App. 250. See notes to Section 2527, ante."

Section 2568 of the Civil Code of the State of California:

"Section 2568. Information of the nature or amount of the interest of one insured need not be communicated *unless in answer to an inquiry,*

except as prescribed by Section 2587. (Enacted March 21, 1872)."

Rule of Construction.

"A policy is construed most strongly against insurer, because he frames it and the intention of the parties as gathered from the entire policy controls. Tischler v. Farmers' Mutual Fire Ins. Company, 66 Cal. 178.

As said in Bankers' Reserve Life Co. v. Rice, 226 Pac. 324, (Supreme Court, Oklahoma): "If the policy of insurance is capable of being construed in two ways, that interpretation should be placed upon it which is most favorably calculated to accomplish the purposes the parties had in mind in creating the contract. Taylor v. Ins. Co. of North America, 25 Okla. 92, 105 Pac. 354, 138 Am. St. Rep. 906; Okla. Nat'l. Life Ins. Co. v. Norton, 44 Okla. 783, 145 Pac. 1138, L. R. A. 1915 E. 695; Friend v. So. States Life Ins. Co., 80 Okla. 76, 194 Pac. 204."

Section 2755 of the Civil Code of the State of California:

"Section 2755. A contract of fire insurance is not affected by any act of the insured subsequent to the execution of the policy, which does not violate its provisions, *even though it increases the risk and is the cause of a loss.* (Enacted March 21, 1872.)

A policy insuring a certain described building and its "additions, adjoining and communicating", covers also a shed 12 x 14 feet, later constructed upon the same premises, and about 7 feet from the original building, for the purpose of storing a part of the goods insured, the door of the shed being opposite a window of the building through which groceries are passed from one building to the other, along a removable board connecting door and window. Taylor v. North-

western National Insurance Co., 25 Cal. App. Dec., Rossini v. St. Paul, etc. Company, 182 Cal. 415, 188 Pac. 564. See also 29 Cal. App. Dec. 445."

Section 2756 of the Civil Code of the State of California:

> "Section 2756. If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the expense it would be to the insured at the time of the commencement of the fire to replace the thing lost or injured in the condition in which it was at the time of the injury; but the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance. (Enacted March 21, 1872.)"

SUMMARY.

Mr. Ariasi was, in the first instance, lawfully permitted by the United States Government to make, use, possess and sell wine. This authorization was founded upon a valid statute and therefore his wine was at no time "contraband" or "outlawed". He expended money in purchasing grapes from which he made the wine, he paid for the labor necessary in making the wine; he paid taxes and insurance thereon and no other person had any interest therein, so how could any one say that his interest in the wine was not an *insurable interest,* or that he was not the "sole and conditional owner" thereof.

All that the revocation of his permit did was to deprive him of certain rights, temporarily; said temporary suspension being:

1. Discontinuance of manufacture;
2. To tax, pay and remove from premises;
3. Transfer in bond; and to
4. Sell wine.

This revocation did not deprive him of any "property right" or make the wine manufactured under his permit "contraband" or "outlawed". He could have applied for a "special permit" to dispose of stock on hand and the Prohibition Commissioner could have given him this special permit to dispose of his wine during the period his permit was revoked. In fact, such procedure is very common in the prohibition department and is being done all the time.

Therefore, until the United States Government libeled the wine and directed its forfeiture, Mr. Ariasi was lawfully in possession thereof and had a property right therein, sufficient to give him an insurable interest which could be the subject of a contract of insurance.

In conclusion we respectfully submit that upon the grounds and for the reasons hereinbefore stated, the judgment made and entered in this cause, in favor of the plaintiff herein and against the defendants should be allowed to stand.

Dated, San Francisco,
June 13, 1928.

Respectfully submitted,
ROY L. DAILY,
Attorney for Defendant in Error.